SCHOOL BOARD'S EFFORT TO REDUCE DE FACTO SEGREGATION UPHELD

Balaban v. Rubin
14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281 (1964)

Certain white residents of New York City, whose children were scheduled to attend new Junior High School 275, instituted a proceeding to invalidate the zone adopted for the new school by the city's board of education. The plaintiff-parents maintained that the zone violated section 3201 of the New York Code, the New York Constitution, and the fourteenth amendment of the United States Constitution because their children were excluded on racial grounds from school 285, their traditional neighborhood school. The initial zoning map for the new school, the Blodnick plan,[1] received some community support, but board of education officials rejected it principally because the plan failed to prevent de facto segregation of Negro and Puerto Rican students in the new building. Under the Blodnick plan the enrollment would have been fifty-two per cent Negro, thirty-four per cent Puerto Rican, and fourteen per cent non-Puerto Rican white.

The challenged zone was then formulated and adopted by the board of education[2] with the result that school 275's enrollment would be approximately one-third Negro, one-third Puerto Rican, and one-third non-Puerto Rican white. The children of the parents who contested the adopted plan live within walking distance of new school 275, and no farther from school 275 than from school 285, which they previously attended.[3]

The supreme court held that the adopted zone violated Education Law section 3201,[4] which provides that admission into or exclusion from any public school in New York shall not depend upon race.[5] The appellate

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[1] The Blodnick plan was formulated by Dr. Blodnick, who is Assistant Superintendent for Local School Districts 41 and 42. The junior high school involved here is in District 42.

[2] The adopted plan was formulated by Mr. Turner, who is Assistant Superintendent of Schools and also head of the Central Zoning Unit. Turner modified Dr. Blodnick's districting map by excluding a northerly area with a heavy Negro population and including a predominantly white area. Petitioner's two children and some forty-nine other white children on whose behalf this proceeding was brought reside in the latter area.

[3] The petitioning parents asserted that school 285 was in their residential neighborhood, which contrasted with the part slum, part deteriorated residential area, and part high-rise apartment neighborhood in which new Junior High School 275 was built. All the children scheduled for admittance into school 275 were in their first year of junior high school so that no one was transferred from one school to another.

[4] N.Y. Educ. Law § 3201 provides, "No person shall be refused admission into or be excluded from any public school in the state of New York on account of race, creed, color, or national origin."

[5] Balaban v. Rubin, 40 Misc. 2d 249, 242 N.Y.S.2d 973 (Sup. Ct. 1963). The supreme court said "the inclusion of petitioners' children in the school zone approved

division reversed, holding that section 3201 was not violated by requiring white children to attend new Junior High School 275, where they live closer to or no farther from the new school than from the old school; and that the board of education has the power to consider race in delineating a zone for a new school to prevent segregation in that school at its inception.[6] The court of appeals affirmed[7] and the United States Supreme Court denied certiorari.[8]

The issue involved in *Balaban v. Rubin* was narrowly construed by the court of appeals to be whether a board of education may, not must, consider, among other relevant matters, the factor of racial balance when adopting a zoning plan for a school. The court of appeals did not discuss whether there is an affirmative constitutional obligation to take action to reduce de facto segregation. Despite the narrow ground of the holding, the case is significant because it is one of the first cases in which the highest court of a state has been confronted with an attempt by a school board to reduce de facto segregation.[9] The decision in favor of the school board's action and the subsequent denial of certiorari by the United States Supreme Court[10] will provide strong support for good faith attempts by school boards in New York and in other states to reduce de facto segregation.

In *Brown v. Board of Educ.*,[11] the Supreme Court ruled that segregation of children in public schools solely on the basis of race, even though the facilities[12] be equal, deprives the children of minority groups of equal protection of the laws. *Brown* involved de jure segregation; therefore, the Court did not then rule, nor has it yet ruled, on the constitutional issues of de facto segregation.

The authority from lower court decisions concerning de facto segregation is conflicting. As far back as 1957, a federal court of appeals held in *Borders v. Rippy*[13] that the equal protection and due process clauses of the fourteenth amendment do not affirmatively command integration, but

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for J.H.S. 275, upon the basis of their race, and their consequent exclusion from J.H.S. 285, their traditional neighborhood school, and from other schools to which they might have been assigned upon a lawful basis, was violative of the spirit and intent of the statute." *Id.* at 252, 242 N.Y.S.2d at 976.

[6] Balaban v. Rubin, 20 App.Div.2d 438, 248 N.Y.S.2d 574 (1964). The appellate division's decision is discussed in 15 Syracuse L. Rev. 561 (1964).

[7] Balaban v. Rubin, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281 (1964).

[8] 379 U.S. 881 (1964).

[9] See Morean v. Board of Educ., 42 N.J. 237, 200 A.2d 97 (1964), decided one week before the New York Court of Appeals' decision in *Balaban*. *Morean* cited the appellate division's decision in *Balaban*.

[10] *Supra* note 8.

[11] 347 U.S. 483 (1954). The Court said "that to separate Negro children from others of similar age and qualifications solely because of their race generates a feeling of inferiority which affects their motivation to learn and has a tendency to retard their mental development." *Id.* at 494.

[12] Included in "facilities" would be the building, rooms, teachers and their salaries, books, and financial resources.

[13] 247 F.2d 268 (5th Cir. 1957).

only forbid state action requiring segregation because of race.[14] This view is supported by the majority of cases [15] and was adopted by the appellate division in *Balaban*.[16]

Contrary to the majority view, the California Supreme Court hinted in *Jackson v. Pasadena City School Dist.*[17] that an affirmative duty does exist on the part of school boards to reduce de facto segregation.[18] The view opposite *Jackson*, supported by some authority, was advanced by way of dictum in *Bell v. School City of Gary*.[19] This position is that the school boards may not constitutionally consider race at all, whether they intend to integrate or segregate.[20] The middle ground between *Jackson* and *Bell*, established by *Balaban*, is that while affirmative action by school boards is not constitutionally required, it is not constitutionally forbidden. School boards, according to *Balaban*, may consider the race of pupils in delimiting school zones in attempting to avoid dominance by one race in a school, but they do not have to consider race.

Constitutional Treatment of Race

The New York Court of Appeals' decision in *Balaban* discussed principally whether the plaintiffs' statutory rights under section 3201 of the New York Education Law [21] were violated. The court reasoned that since the adopted plan "excludes no one from any school and has no tendency to foster or produce racial segregation,"[22] section 3201 was in no way violated. The court of appeals also said that there was no other legal impediment to the adoption of the zoning plan.[23] The court's statement that the plan "excludes no one from any school" is true only if one infers

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[14] *Id.* at 271.

[15] See Bell v. School City of Gary, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964); Avery v. Wichita Falls, 241 F.2d 230, 233 (5th Cir. 1957), *cert. denied*, 353 U.S. 938 (1957); Evans v. Buchanan, 207 F. Supp. 820 (D.Del. 1962); Shuttlesworth v. Birmingham Bd. of Educ., 161 F. Supp. 372, 378 (N.D. Ala. 1958), *aff'd*, 358 U.S. 101 (1958).

[16] *Supra* note 6, at 446, 248 N.Y.S.2d at 581.

[17] 59 Cal. 2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963). See 37 So. Cal. L. Rev. 350 (1964).

[18] *Id.* at 881, 382 P.2d at 882, 31 Cal. Rptr. at 609: "The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause."

The *Jackson* case, however, was on appeal from a lower court's decision sustaining a demurrer to the plaintiff's petition which alleged that the defendant school board was guilty of intentional discrimination. Since the plaintiff alleged intentional discrimination, the California Supreme Court needed only to rely on *Brown* to reverse the lower court's decision and return the case for trial. Therefore, the California Supreme Court's language regarding an affirmative duty was dictum.

[19] 213 F. Supp. 819 (N.D. Ind. 1963), *aff'd*, 324 F.2d 209 (7th Cir. 1963).

[20] *Id.* at 831.

[21] *Supra* note 4.

[22] *Supra* note 7, at 199, 199 N.E.2d at 377, 250 N.Y.S.2d at 284.

[23] *Ibid.*

that the court meant that no one was excluded from a school which he had a right to attend—and, barring special circumstances, a child has a right to attend only the school within his school district as legally determined by the school board.[24] The court then apparently relied on the legislative purpose of Education Law section 3201 to conclude that the statute was not violated. Section 3201 was enacted to repeal an old New York law[25] which had authorized separate schools for Negroes. Therefore, when the court said that the zoning plan had no tendency to foster racial segregation, it was referring to the legislative purpose of section 3201—the elimination of segregation—and inferring that the section did not apply to attempted integration.

After the court briefly dismissed the question of any violation of section 3201, it held that the zoning decision by the board was not arbitrary or unreasonable, but instead was within its power because (1) the board had the statutory power to determine the school each pupil should attend; (2) no child had to travel farther to new school 275 than he would have had to travel to attend his neighborhood school; and (3) no oppressive results existed.[26]

Nowhere in the majority's opinion are possible federal or New York constitutional issues mentioned or discussed. The court did, however, intimate that it considered constitutional issues by its statement, "nor was there any other legal impediment to [the school zone's] adoption." [27]

The brief opinion's tacit avoidance of constitutional issues did not, however, discourage Judge Van Voorhis from vigorous dissent. The dissent argued, first, that the principle of anti-discrimination and the mandates of the fourteenth amendment and the New York Constitution[28] require each person to be treated without regard to race, religion, or national origin;[29] second, that if Negroes can legally be admitted to schools because they are Negroes, they can be excluded for the same reason;[30] and third, if school children can be admitted because they are Negroes, they can also be admitted because they are Aryans, Roman Catholics, Anglo-Saxons, Jews, and so on.[31] Judge Van Voorhis stated further that "it would be hopeless for any school board or other governing body to try to assemble an ideal amalgam by admitting the right quotas or other proportions of cultural, religious, or ethnic groups." [32]

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[24] Balaban v. Rubin, *supra* note 6, at 443, 248 N.Y.S.2d at 578-79.

[25] New York Laws 1894, ch. 556, tit.15, § 28.

[26] *Supra* note 7, at 199, 199 N.E.2d at 377-78, 250 N.Y.S.2d at 284.

[27] *Id.* at 199, 199 N.E.2d at 377, 250 N.Y.S.2d at 284.

[28] N.Y. Const. art. I, § 11: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."

[29] *Supra* note 7, at 199, 199 N.E.2d at 378, 250 N.Y.S.2d at 285 (dissenting opinion).

[30] *Id.* at 200, 199 N.E.2d at 378, 250 N.Y.S.2d at 285 (dissenting opinion).

[31] *Ibid.*

[32] *Ibid.*

The second argument of the dissent is without merit,[33] and, although the third argument may have some practical merit in connection with the simple administration practice of "balanced" schools, it has slight legal merit because it overgeneralizes. The federal constitution does not require that state regulation reach at once every class to which it might be applied.[34] Therefore, assuming that race, religion, and nationality can be considered when integrating, even if the dissenter's third proposition is true, the board's consideration of only Negroes in an attempt to balance the new school does not invalidate the ruling and does not violate the equal protection clause. But it can, however, be argued that the third proposition is not true, for regulation may recognize degrees of evil without being arbitrary or in conflict with the equal protection clause of the fourteenth amendment.[35] Hence, if it can be shown that the Negro segregation problem is so unique, so inequitable, as to deserve special regulation, then the third proposition would not be true.

The dissent's proposition that the fourteenth amendment requires that each person be treated without regard to his color, religion, or creed, is constitutionally the most significant. This proposition puts in issue conflicting fourteenth amendment interpretations concerning whether race can be considered when attempting to integrate public schools. The conflict is between the argument that race per se cannot constitutionally be considered at all by states and the argument that the fourteenth amendment only requires that there be a legally sufficient legislative purpose before a state may properly consider race. The United States Supreme Court has not yet stated which of the interpretations, if either, it considers correct with respect to the elimination of de facto segregation in public schools.

The equal protection clause was not intended to interfere with the power of the state to prescribe regulations to promote health, peace, morals, education, and the good order of the state.[36] Persons may be classified for legislative purposes provided such classifications are (1) reasonable and necessary for the purpose of the legislation,[37] (2) based on proper and justifiable distinctions, considering the purpose of the law, and (3) not clearly arbitrary.[38] Before *Brown,* classification according to race was permitted.[39] The test for determining the validity of a racial classification was laid down in *Korematsu v. United States.*[40] In holding that Korematsu,

[33] Brown v. Board of Educ., 347 U.S. 483 (1954), and subsequent school segregation cases leave no doubt that Negroes cannot be legally excluded from schools solely because they are Negroes. The dissenter does not in his opinion support the statement that if Negroes can be admitted because they are Negroes, they can be excluded for the same reason.

[34] Goesaert v. Cleary, 335 U.S. 464, 466 (1948); Chicago Dock & Canal Co. v. Fraley, 228 U.S. 680, 687 (1913).

[35] Skinner v. Oklahoma, 316 U.S. 535, 540 (1942).

[36] Barbier v. Connolly, 113 U.S. 27, 31 (1885).

[37] Railway Express Agency v. New York, 336 U.S. 106, 110 (1949).

[38] Goesaert v. Cleary, 335 U.S. 464, 466 (1948).

[39] Plessy v. Ferguson, 163 U.S. 537 (1896).

[40] 323 U.S. 214 (1944).

an American citizen of Japanese descent, had not been unconstitutionally convicted for remaining in a military area in contravention of a Civilian Exclusion Order, the Court stated that:

> all legal restrictions which curtail the civil right of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonisms never can.[41]

Since the *Brown* decision, a per se argument has found support in some of the school integration cases.[42] The *Brown* decision itself is considered by some to have established a per se rule forbidding any classification by race whatever.[43] Several per curiam decisions [44] by the Supreme Court since *Brown* have made at least one commentator wonder whether the Supreme Court is approaching a per se rule.[45] Despite this authority to the contrary, the nearly universal belief is that the *Brown* decision itself did not declare that the fourteenth amendment forbids all racial distinctions in legislation.[46] The Court's heavy emphasis on the feelings of inferiority engendered by compulsory segregation indicates that the Court considered segregation in public schools solely on the basis of race to be unreasonable and unrelated to any proper governmental purpose and, therefore, a denial of equal protection, but not on a per se basis.[47]

On the same day that *Brown* was decided, the Supreme Court ruled in *Bolling v. Sharpe*[48] that segregation in the public schools of Washington, D.C., was a denial of due process in violation of the fifth amendment [49] because such segregation was unrelated to any proper governmental objective. Since the equal protection clause does not apply to the District of Columbia, the Supreme Court applied the fifth amendment's due process

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[41] *Id.* at 216.

[42] Bell v. School City of Gary, *supra* note 19, at 831. See also the lower court decision in Balaban v. Rubin, 40 Misc. 2d 249, 242 N.Y.S.2d 973 (1963).

[43] See Blaustein & Ferguson, Desegregation and the Law 145 (1957).

[44] New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958), *affirming per curiam* 252 F.2d 112 (5th Cir. 1958); Gayle v. Browder, 352 U.S. 903 (1956), *affirming per curiam* 142 F. Supp. 707 (N.D. Ala. 1956); Holmes v. City of Atlanta, 350 U.S. 879 (1955), *reversing per curiam* 223 F.2d 93 (5th Cir. 1955); Mayor and City Council v. Dawson, 350 U.S. 877 (1955), *affirming per curiam* 220 F.2d 386 (4th Cir. 1955); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954), *reversing per curiam* 202 F.2d 275 (6th Cir. 1953).

[45] See Wechsler, "Toward Neutral Principles of Constitutional Law," 73 Harv. L. Rev. 1, 22, 32 (1959).

[46] *Id.* at 32; See Hellerstein, "The Benign Quota, Equal Protection, and The Rule In Shelly's Case," 17 Rutgers L. Rev. 531 (1963).

[47] Hellerstein, *supra* note 46.

[48] 347 U.S. 497 (1954).

[49] U.S. Const. amend. V.

clause. The Court implied, however, that the fifth amendment's due process clause and the fourteenth amendment's equal protection clause are closely related in their reqirements concerning racial classifications.[50] The Court in *Bolling* substantiated the conclusion that a per se rule was not intended to be adopted by referring to *Korematsu v. United States*[51] and its proposition that racial classifications are "constitutionally suspect."[52]

An analysis of the recent case of *Anderson v. Martin*[53] suggests that the Court since *Brown* and *Bolling* still is not adopting a per se rule. In *Anderson,* Negro candidates for election to a Louisiana parish school board filed suit to enjoin the enforcement of a Louisiana statute which required that in all primary, general, or special elections, the nomination papers and ballots should designate the race of the candidate. The Supreme Court held that Louisiana's compulsory designation on the ballot of candidates' races operated as a discrimination against the claimants and violated the equal protection clause of the fourteenth amendment.[54] The Court reasoned that the vice of the statute lay in placing the power of the state behind a racial classification that tended to induce racial prejudice at the polls.[55] The Court, apparently looking into the legislature's motive, further reasoned that since that statute was not enacted until 1960, when private attitudes towards Negroes were hostile, the enactment could only result in a "repressive effect."[56] The Court then concluded that the challenged provision could not be deemed reasonably designed to meet legitimate governmental interests in informing the electorate of its candidates, since there was no relationship between the state's designation of race and the candidate's qualifications for office:

> Nor can the attacked provision be deemed to be reasonably designed to meet legitimate governmental interests in informing the

[50] Bolling v. Sharpe, *supra* note 48, at 500: "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution wound impose a lesser duty on the Federal Government."

[51] *Supra* note 40.

[52] Bolling v. Sharpe, *supra* note 48, at 499: "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."

[53] 375 U.S. 399 (1964).

[54] *Id.* at 401-02.

[55] The Court stated:

> [B]y placing a racial label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race for another. This is true because by directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important—perhaps paramount—consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot along racial lines.

Id. at 402.

[56] *Id.* at 403.

> electorate as to candidates. We see no relevance in the States' pointing up the race of the candidate as bearing upon his qualification for office. Indeed, this factor in itself "underscores the purely racial character and purpose" of the statute.[57]

It might be argued that the facts in *Anderson* do not support the Court's finding that racial prejudice was encouraged by the Louisiana statute, but the legal basis upon which the Court rested its decision is unarguably clear—no legitimate governmental interest existed to justify the racial classification. If the Court were using a per se rule that racial classifications are illegal, it would not have had to reason that a vice existed in the statute and that a legitimate governmental interest was lacking. Therefore, it appears that the Supreme Court still considers that the equal protection clause does not per se forbid racial classifications and that the "rigid scrutiny" test of *Korematsu*[58] is still to be applied to determine the presence of racial antagonisms.[59]

The recent Supreme Court decision in *Tancil v. Woolls*[60] substantiates the conclusion that under proper circumstances race may be considered by a state. In *Tancil*, the Supreme Court, without opinion, affirmed a federal district court's decision upholding a Virginia statute which required the designation of the races of the parties in divorce records.[61] The district court had reasoned that the designation of race in divorce records serves useful purposes in providing information which aids identification and in the compilation of useful statistics.[62]

If it be true that the "proper legislative purpose" rule and not the per se rule is the constitutional test for racial classifications, the decision of the New York Court of Appeals in *Balaban* could be legally justified by reasoning in the following way: (1) the state, when seeking to provide and require compulsory public education, must do so as equally as is feasible,[63] (2) a Negro in a de facto segregated, predominantly Negro school receives an inherently unequal education, (3) therefore, the state has a legitimate governmental purpose in considering race along with other material factors when delineating school zones in order to reduce inherent inequality. Consequently, no unconstitutional denial of equal protection of the laws is involved in "balancing" schools.

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[57] *Ibid.*

[58] *Supra* note 40, at 216.

[59] The denial of certiorari in *Balaban* might imply that the fourteenth amendment does not require a per se rule concerning racial classifications.

[60] 379 U.S. 19 (1964), *affirming per curiam* 230 F. Supp. 156 (E.D. Va. 1964).

[61] Va. Code Ann. § 20-101 (1950): "Any interlocutory or final decree granting a divorce a mensa et thoro or a vinculo matrimonii, as the case may be, shall contain a recital showing the race of the husband and wife; but the failure of such decree to contain such recital shall not affect the validity of such decree or divorce."

[62] Hamm v. Virginia State Bd. of Elections, 230 F. Supp. 156, 158 (E.D. Va. 1964).

[63] See Brown v. Board of Educ., 347 U.S. 483 (1954).

RAMIFICATIONS

Though the *Balaban* case did not involve any "bussing" of students, cases in the future will. With the use of neighborhood school districts in any school system with a large and expanding percentage of Negro population, a racial inbalance will occur in certain schools. The question then arises concerning the degree to which the *Balaban* principle will be extended. If a Negro neighborhood school and a white neighborhood school are not in close proximity as the schools were in *Balaban*, should a school board be permitted to bus students from a predominantly Negro section of town to a predominantly white section?[64] In *Strippoli v. Bickal*,[65] a case now on appeal to the New York Court of Appeals, the appellate division held that the school board could bus students from a badly overcrowded Negro neighborhood school to a new, partially vacant white neighborhood school, even though racial balance was one of the motivating reasons. The appellate division, relying on *Balaban*, reasoned that a transfer of students was needed because of the overcrowded conditions in the Negro neighborhood school; therefore, the consideration of racial balance in connection with the transfer did not invalidate the otherwise reasonable transfer.

Another New York Appellate Division decision, *Di Sano v. Storandt*,[66] also upheld a school board's plan which involved "bussing." The plan in *Di Sano* designated as "sending" schools a number of schools having a high percentage of non-white students, and as "receiving" schools a number of schools with unused classroom space and a non-white student enrollment less than the city average. For the purpose of reducing racial imbalance, Negro students enrolled in the sending schools were permitted to transfer to receiving schools upon request for transfer by their parents.[67]

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[64] Wechsler, *supra* note 45, at 33, said that the judgment in *Brown* "must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved." On this basis, if the Negroes in a community are a minority of the population and decide that they want to be segregated from the whites and are then segregated, there would be no violation of equal protection.

[65] 21 App. Div. 2d 365, 250 N.Y.S.2d 96 (1964), *reversing* 42 Misc. 2d 475, 248 N.Y.S.2d 588 (1964).

[66] —App.Div.2d—, 253 N.Y.S.2d (1964), *reversing* 43 Misc. 2d 272, 250 N.Y.S.2d 701 (1964).

[67] For the reaction of some parents see U.S. News and World Report, Oct. 26, 1964, p. 71; Time, Oct. 16, 1964, p. 98. Besides constitutional problems, a school board before acting to reduce de facto segregation must consider the expense involved. There was testimony in Bell v. School City of Gary, *supra* note 15, that under the plaintiff's plan at least 6,000 pupils would have to be transported on each school day, presumably by bus, and that the cost of operating one bus was twenty dollars per day. The transportation of students would be a matter of considerable concern to the administrators of an already heavily taxed and indebted school district. Moreover, the administrative problem of choosing those students to be transferred and those

Should a school board decide to transport students, one plan which could be used is the Princeton Plan. Under this plan, two schools are paired—one predominantly white and the other predominantly Negro—and children attend one school for several years (for example, for the first three grades) and the other school for the remainder of the years (the last three grades).[68]

Another possible plan for the integration of public schools, a quota system, was called unconstitutional in dictum by the appellate division in *Balaban*.[69] The plaintiffs in *Balaban* contended that the plan adopted by the school board was a quota system. The appellate division, while suggesting that such a system would be constitutionally invalid, was quick to differentiate the *Balaban* plan from a quota system. A school quota system, which is similar to the housing "benign quota," [70] is a system which fixes a ratio in terms of race for the attendance of schools. The attendance in schools under such a system is controlled to maintain a fixed ratio between different races for an indefinite period of time. The basis of a quota system is the avoidance of the so-called "tipping-point." The "tipping-point" is the theoretical maximum minority group proportion which whites will tolerate in a given school. As the whites become accustomed to the Negroes' presence, the proportion of Negroes is increased until the desired racial balance is achieved. Since the status quo is maintained until it is felt that the whites will tolerate more Negroes, Negroes or whites in the school's district in excess of the quota are sent to another school. A white student will not be permitted to enter a school under a quota system unless another white, previously enrolled in the school in the same grade, has left. The same procedure is applied to Negroes seeking enrollment.

The appellate division implied that the individual racial exclusion of Negroes or whites otherwise eligible to attend the school in their residential district makes the quota system constitutionally repugnant. The plan adopted in *Balaban* was not held a quota system, because Negroes and whites moving into the new school zone were to be able to attend the school regardless of the effect on the existing proportion of whites and non-whites and regardless of whether any whites or non-whites had moved out of the zone. In the future, if a school quota system is to be used and upheld, it must be shown that the so-called "tipping-point" exists and that whites will gradually accept a larger percentage of Negroes in the schools. Most importantly, it will also have to be shown that the quota system's purpose, the gradual inclusion of the Negro, is sufficently related to a proper governmental purpose (the elimination of de facto segregation) to justify the exclusion of students from a school solely because of their race.

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not to be transferred in a growing school system would be burdensome, as would be the reaction of many parents.

[68] Note, 15 Syracuse L. Rev. 561, 563 n.14 (1964). A modification of the Princeton Plan was upheld in Vetere v. Mitchell, 21 App.Div. 2d 561, 251 N.Y.S.2d 480 (1964).

[69] Balaban v. Rubin, 20 App.Div. 2d 438, 448, 248 N.Y.S.2d 574, 584 (1964).

[70] For a discussion of the housing benign quota, see Hellerstein, *supra* note 46.

Conclusion

As the law stands after the *Balaban* case, the decision to reduce de facto segregation is left to the school boards and to the parents and voters involved. School boards still have no affirmative duty to integrate, but may, in selecting the geographic zone for a school, consider racial factors along with other relevant criteria, in order to prevent racially segregated schools. The neighborhood school plan is still constitutional, and school systems developed on a neighborhood plan, which are honestly constructed with no intention to segregate races, need not be destroyed because of racial imbalance in certain schools where districts are populated almost entirely by Negroes or whites.

It is the opinion of this writer that the courts should not require an affirmative duty on the part of school boards to reduce de facto segregation, nor should they forbid such a reduction. Though there is sufficient public interest and legislative purpose to justify the consideration of race by boards which act to eliminate de facto segregation, the inequality of de facto segregation is not caused by state action, but by private discrimination in housing.[71] The equal protection clause does not require the state to make amends for private discrimination. Further, if the citizens of a school district or state through their school officials decide in good faith that their schools should be racially balanced, the federal constitution should be no bar. If the citizens disagree with their school officials' good-faith attempts to integrate their schools, the citizens' remedy should be at the polls, not in the courts.

[71] Hellerstein, *supra* note 46; Note, "Racial Discrimination in Housing," 107 U. Pa. L. Rev. 515 (1959).